

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER KING GOODRICH,

Defendant-Appellant.

UNPUBLISHED

January 21, 2000

No. 211827

Kent Circuit Court

LC No. 97-11028-FC

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of three counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, as well as three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to ten to twenty-five years' imprisonment on each of the assault convictions. Those sentences were ordered to run consecutively to the mandatory two-year concurrent sentences for the felony-firearm convictions. Defendant appeals as of right. We affirm.

I

Defendant first argues that the prosecution failed to present sufficient evidence from which a rational trier of fact could find that he was guilty of assault with intent to commit murder, MCL 750.83; MSA 28.278, beyond a reasonable doubt. We disagree.

When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998).

The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Bush*, 187 Mich App 316, 327; 466 NW2d 736 (1991).

Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of the offense. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999). Moreover, the intent to kill may be proved by inference from any facts in evidence. *People v Drayton*, 168 Mich App 174, 177; 423 NW2d 606 (1988). Defendant contends that the prosecution failed to establish the requisite intent to kill the victims of the shooting, none of whom was struck by a bullet. Our review of the evidence supports a finding that defendant possessed the requisite intent.

The testimony showed that defendant used a semi-automatic weapon, leaned out the window of his slowly moving car, aimed low in an attempt to strike the victims who had taken cover, and hit the driver's side door only a few inches from where one of the victims was seated. Although no motive for the shooting was ever conclusively established, defendant and one of the victims belonged to rival gangs. Viewing this evidence and all reasonable inferences therefrom in a light most favorable to the prosecution, a reasonable trier of fact could have concluded that defendant possessed the requisite intent to kill. *Id.*; *People v Ritsema*, 105 Mich App 602, 608-609; 307 NW2d 380 (1981).

II

Defendant next argues that he was deprived of a fair and impartial trial due to several instances of prosecutorial misconduct. We disagree.

This Court reviews allegations of prosecutorial misconduct de novo. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Defendant failed to object to the prosecution's remarks. Consequently, appellate review is foreclosed unless the prejudicial effect of the remarks was so great that it could not have been cured by an appropriate instruction or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Defendant's first point of contention stems from the prosecutor's elicitation of testimony regarding defendant's gang affiliations and the subsequent use of that testimony by the prosecution to suggest that the shooting was gang related.

At trial, several witnesses, including witnesses for the defense, affirmed defendant's gang affiliations. Contrary to defendant's assertion, the prosecution's remarks regarding the possibility that the shooting was gang motivated were properly based upon evidence produced at trial and were well within the inferences that could be drawn from such evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Consequently, we find that defendant was not denied a fair trial by any such comment.

Defendant next asserts that he was denied a fair trial when the prosecutor argued to the jury that defendant and others had threatened or otherwise attempted to influence several witnesses in an attempt to prevent them from testifying at trial. According to defendant, such argument was improper because, despite the prosecution's efforts to develop testimony in support of the argument, the witnesses denied

any such threats had been made. We disagree

On questioning by the prosecution, one witness stated that she had been approached by two men at her high school and that, after being asked about her testimony, one of the men stated as he was walking away, “I’m gonna kill them bitches.” Other witnesses testified to being confronted, but not threatened.

A prosecutor is free to relate the facts adduced at trial to the prosecution's theory of the case and to argue the evidence and all reasonable inferences arising from it to the jury. *Bahoda, supra* at 282. There was sufficient testimony from which the prosecution could argue the inference.

Next, defendant contends that the prosecutor improperly denigrated the defense witnesses who attempted to provide defendant with an alibi for the night of the shooting. Again, we disagree. A review of the record reveals nothing improper in this line of questioning. This Court has held on numerous occasions that the credibility of a witness may be attacked by showing that he failed to speak or act when it would have been natural to do so if the facts were in accordance with his testimony. *People v Martinez*, 190 Mich App 442, 446; 476 NW2d 641 (1991); *People v Fuqua*, 146 Mich App 250, 254-256; 379 NW2d 442 (1985); *People v Lafayette*, 138 Mich App 380, 388-389; 360 NW2d 891 (1984). Here, the alibi witnesses cross-examined by the prosecutor admitted to a close relationship with defendant, and that they were aware of the charges against defendant shortly after his arrest. Based on these facts, a logical inference could be drawn that the witnesses would have brought their information to the police shortly after learning of the charges. See *Martinez, supra*; *People v Perkins*, 141 Mich App 186; 366 NW2d 94 (1985). Therefore, we find no error in the prosecution’s questions or comment in that regard.

Defendant also argues that the prosecutor improperly vouched for the credibility of his witnesses during closing arguments. This argument is wholly without merit. Although a prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully, *Bahoda, supra*, 276, he may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

A review of the challenged remarks reveals that the comments regarding the credibility of a prosecution witness were made in reference to the testimony and evidence presented at trial. The prosecutor did not personally vouch for the credibility of the prosecution witness, but rather argued that her demeanor while testifying demonstrated that her testimony identifying defendant as the gunman was credible. In this context, the remarks were not improper. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Defendant further argues that the prosecution exceeded the bounds of proper closing argument in encouraging the jury “to engage in wild conclusions from the skimpy evidence adduced at trial.” Specifically, defendant argues that it was improper for the prosecution to advance a theory that the shooting was gang related, to argue that prosecution witnesses had been intimidated, and to attack the credibility of a defense witness based upon a courtroom outburst made by her at the beginning of the

trial.

Regarding defendant's first two assertions, we have already discussed those matters and have dismissed them for want of merit. Unlike defendant's previous arguments, the issue of the prosecution's use of the courtroom outburst has been preserved for appellate review by objection of defense counsel during both the cross-examination of the witness and closing argument. Defendant offers no support for his assertion that the prosecutor's argument in this regard resulted in prejudice sufficient to support a finding that he has been denied a fair trial.

When reviewing a claim of prosecutorial misconduct in closing argument, the record must be read as a whole, and allegedly impermissible statements judged in the context in which they are made. *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995). After reviewing the record, we conclude that the prosecution's comments were insufficient to support defendant's claim that he was denied a fair trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

Defendant next argues that the prosecutor improperly placed the prestige of his office behind the strength of the case and the credibility of prosecution witnesses. While defendant is correct in his assertion that a prosecutor may not place the prestige of his office behind the strength of his case or the credibility of his witnesses, *Reed, supra*, 399, we have reviewed the record and are unable to find any instance arguably resembling such conduct.

Finally, defendant asserts that during closing argument, the prosecutor erroneously stated the elements of the lesser included offense of felonious assault. No authority or argument is offered in support of this proposition. Generally, this Court will not search for authority to sustain or reject a defendant's position on appeal. *People v Jensen*, 231 Mich App 439, 457; 586 NW2d 748 (1998). Once again defendant's failure to object below limits this Court's review of his claim on appeal. Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct. *People v Allen*, 201 Mich App 98; 505 NW2d 869 (1993). Neither situation is present here. Even assuming that the prosecutor erred in his recitation of the elements, reversal is not warranted because the trial court correctly instructed the jury on the elements. See *People v Crook*, 162 Mich App 106, 108; 412 NW2d 661 (1987).

III

The trial court admitted, without objection from defendant, preliminary examination testimony as evidence at defendant's trial. On appeal, defendant asserts that his constitutional right to confrontation was violated by the admission of this testimony because the prosecution had failed to demonstrate that it had made diligent attempts to secure the witness' attendance at trial. Since defendant failed to object at trial, this issue is not preserved.

Our Supreme Court has stated that, to avoid forfeiture of an issue under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or

obvious, 3) and the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings, and it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.* Moreover, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763-764, quoting *United States v Olano*, 507 US 725 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993). As such, this Court must first review the record to determine whether any error occurred.

Former testimony of a witness is admissible in a later proceeding where that witness is unavailable to testify and the party against whom the testimony is being admitted had an opportunity to cross-examine the witness at that time. MRE 804(b)(1). The declarant is unavailable when he is absent from the hearing and the proponent of his statement has used due diligence to procure his attendance. MRE 804(a)(5).

The prosecution elicited testimony from a police detective regarding his attempts to locate the witness. Counsel for defendant declined to cross-examine the detective regarding his efforts to locate the witness. The trial court apparently concluded that due diligence in attempting to locate the witness had been demonstrated and therefore, because he was unavailable at trial, his prior recorded testimony could be admitted. The witness' preliminary examination testimony was then read into the record without objection from defendant.

In light of these efforts, we find that the witness was "unavailable" for the scheduled trial and that the prosecution exercised due diligence in attempting to locate the witness. Furthermore, we note that although the preliminary examination testimony corroborated that a shooting took place, it offered nothing to implicate defendant in the crime or otherwise prejudice defendant. For these reasons, we conclude that the trial court did not abuse its discretion in allowing the use of the unavailable witness' preliminary examination testimony. Because defendant has failed to demonstrate error, as required under the first prong of the *Carines* test, we decline to review this issue further.

IV

Defendant next contends that the trial court erred in failing to instruct the jury with several standard jury instructions. However, because defendant failed to either request or object to the instructions given at trial, he has failed to preserve this issue and, thus, this Court will review only to prevent manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995).

Defendant's theory of the case was that he was not the shooter, that there was a question of identity. Defendant argues on appeal that the trial court should have sua sponte given an instruction regarding specific intent and the intoxication defense. Defendant never argued that he was intoxicated and unable to form the requisite intent. We also reject defendant's other challenges to the jury instructions. Taken as a whole, the instructions sufficiently protected the defendant's rights. *People v*

Moldenhauer, 210 Mich App 158, 159; 533 NW2d 9 (1995).

We also are not persuaded that defendant's counsel was ineffective for failing to request the disputed instructions. To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, that the results of the proceeding were fundamentally unfair or unreliable, and that there is a reasonable probability that, but for counsel's error, the results of the proceeding would have been different. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996). Trial counsel is presumed to have provided effective assistance, and defendant bears the burden of overcoming this presumption. *People v Carr*, 141 Mich App 442, 451; 367 NW2d 407 (1985). Defendant has not overcome the presumption, and we find that despite defendant's contention that the instructions could only have helped him, it may have been defense counsel's strategy to downplay defendant's intent and concentrate solely on the identification issue. This Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

V

Finally, defendant argues that the trial court did not articulate its reasons for the sentence it imposed. This claim is erroneous. The trial court specifically cited the sentencing guidelines before imposing a sentence that was within those guidelines. This satisfied the articulation requirement. *People v Broden*, 428 Mich 343; 408 NW2d 789 (1987).

Defendant also claims that his sentence was disproportionate. We disagree. Defendant's sentence was within the sentencing guidelines range and was presumptively proportionate. *Id.*, 354-355. We have reviewed the record and conclude that defendant has failed to overcome the presumption of proportionality. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995).

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald